TENAGA NASIONAL BHD v. MY SEVEN VACATION SDN BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
HAS ZANAH MEHAT JCA
VAZEER ALAM MYDIN MEERA JCA
[CIVIL APPEALS NO: A-02(IM)(NVCV)-488-03-2019 &
A-02(IM)(NCVC)-521-03-2019]
25 FEBRUARY 2021

UTILITIES: *Electricity supply – Disconnection – Discovery of meter tampering at premises – Notice of disconnection of electricity supply issued – Interim injunction filed against electricity supplier from carrying out disconnection pending hearing of main suits – Whether customers satisfied requirement to obtain interim injunction – Whether electricity supplier enabled to disconnect supply after offending meter rectified or remedied – Whether there was correct application of s. 38 of Electricity Supply Act 1990 – Mayaria Sdn Bhd & Anor v. Tenaga Nasional Berhad*

CIVIL PROCEDURE: *Injunction – Interim injunction – Interim injunction filed against electricity supplier from carrying out disconnection pending hearing of main suits – Whether customers satisfied requirement to obtain interim injunction – Whether electricity supplier enabled to disconnect supply after offending meter rectified or remedied – Whether there was correct application of s. 38 of Electricity Supply Act 1990 – Mayaria Sdn Bhd & Anor v. Tenaga Nasional Berhad*

There were two appeals, namely Appeal 488 and Appeal 521, filed by the appellant/defendant ('appellant') against two separate injunction orders granted in different suits to the respondents/plaintiffs ('respondents') to prevent the appellant from disconnecting the supply of electricity to the respondents' premises. The appellant was the sole provider of electricity and a licensee under the Electricity Supply Act 1990 ('Act') with statutory powers to take action for offences committed under the Act, in particular for the tampering of the appellant's meters and the theft or pilferage of electricity. For Appeal 488, both the first and second respondents, operators of a restaurant business, were the appellant's registered customers of electricity supply to their respective premises. During an inspection on 11 August 2016, the appellant's employees discovered the tampering of meters at the respondents' premises. The appellant then issued a notice of disconnection of electricity supply ('NDES'), notifying the respondents that the electricity supply to the premises would be disconnected under s. 38(1) of the Act (both NDES to the premises were collectively referred to as 'NDES 1'). In NDES 1, the respondents were duly informed of the intended disconnection of electricity to the premises. The meters were subsequently rectified with no outstanding electricity bills for the premises since the said inspection. The respondents filed a writ against the appellant for, *inter alia*, a declaration that the respondents did not tamper with the meters and did not

owe any monies to the appellant resulting from the inspection. The respondents filed an *ex parte* application for an interim injunction against the appellant from carrying out the disconnection as stipulated in NDES 1 until the final disposal of the action. The High Court granted the *ex parte* interim injunction. The appellant's applications to set aside the *ex parte* interim injunction and *inter partes* application to set aside the said injunction were dismissed by the High Court. Aggrieved, the appellant filed an appeal to this court against the decision, which was allowed. Following the decision of this court, the appellant issued the second NDES ('NDES 2'). The respondents subsequently filed another application for an interim injunction to restrain the appellant from carrying out the intent of NDES 2. The High Court again allowed the injunction. For Appeal 521, the second respondent was a company carrying out the business of processing, freezing and cold storage at the premise ('the premise'). The appellant inspected the premise on 7 June 2018 where the appellant's employees were also discovered to have been tampering with the electricity meter. As a consequence, the appellant issued the NDES for execution. The respondents filed a writ against the appellant for, *inter alia*, a declaration that the NDES was null and void. Before the disconnection date, the respondents applied for an interim injunction premised on, *inter alia*, the ground that any disconnection to be carried out at this juncture would cause irreparable damage to the second respondent's business and the appellant would not suffer any loss if the disconnection was not carried out at this juncture, pending the final disposal of the respondent's suit. The High Court allowed both applications for an interim injunction pending the disposal of the suits. Hence, these appeals. The issues that arose were (i) whether the respondents had satisfied the requirement to obtain an interim injunction pending the disposal of the suits; and (ii) whether there had been a correct application of s. 38 of the Act in relying on the case of *Mayaria Sdn Bhd & Anor v. Tenaga Nasional Berhad* ('*Mayaria*').

Held (dismissing appeals)
Per Has Zanah Mehat JCA delivering the judgment of the court:

(1) The issue was whether there were serious issues to be tried for His Lordship at the High Court to exercise his discretion in granting an interim injunction pending the hearing of the suits. However, upon perusal of the amended s. 38 of the Act, particularly sub-s. (4), this court was unable to find the provision that enables the appellant as a provider of the electricity supply to disconnect the supply after the offending meter had been rectified or remedied and further loss of revenue had ceased. Therefore, the amendment had not altered the position as determined by the Federal Court in affirming this court's decision in *Mayaria*. Considering the Federal Court's decision in *Mayaria*, it was suffice to say that His Lordship was correct in exercising his discretion in granting the injunction against the appellant from disconnecting the electricity supply pending the hearing of the main suits. The appellant's

statutory right to disconnect was still relevant and constituted a serious question that must be addressed substantively and ought to be fully determined at the trial. (paras 28 & 33)

Case(s) referred to:
Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd [2018] 9 CLJ 184 CA ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd [2015] 6 CLJ 788 HC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 30, 38(1), (1B), (3), (4)

For the appellant - Raja Ahmad Mohzanuddin Shah Raja Mohzan & Jason Cheong Kak Lok; M/s Azmi & Assocs
For the respondents - Shamsul Bahrin Manaf, Prithi Verma & Maizura Mohamed Amin; M/s Prithi Junainah & Assocs
CM Lai, Loh Cien Zen & Maisarah; M/s CM Lai & Partners

[Editor's note: For the High Court judgment, please see My Seven Vacation Sdn Bhd & Anor v. Tenaga Nasional Berhad [2019] 1 LNS 641 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Has Zanah Mehat JCA:

Introduction

[1] There are two appeals before us, namely Rayuan Sivil No: A-02(IM)(NVCV)-488-03/2019 ("Appeal 488") and Rayuan Sivil No: A-02(IM)(NCVC)-521-03/2019 ("Appeal 521") filed by the appellant/defendant ("the appellant") against two separate injunction orders granted in different suits to the respondents/plaintiffs ("the respondents") to prevent the appellant from disconnecting the supply of electricity to the respondents' premises. Both orders were granted by the same learned Judicial Commissioner at the Ipoh High Court.

[2] We heard the appeals together as the issues are identical. After perusing the appeal records, considering the submissions, both oral and written, we dismissed both appeals with costs in the cause. We now give our reasons for the same.

Background Facts

Appeal 488

[3] The appellant in the suit is the sole provider of electricity in Peninsular Malaysia and is a licensee under the Electricity Supply Act 1990 ('the Act') with statutory powers to take action for offences committed under the Act, in particular for the tampering of the appellant's meters and the theft or pilferage of electricity.

[4] For appeal 488, both the first and second respondents are the appellant's registered customers for electricity supply to their respective premises. Both the first respondent and the second respondent are operators of a restaurant business with common directors. The first respondent carried out its business at No 42 Lorong Cheah Cheng Lim, 30350, Ipoh Perak ("premise 1"), and the second respondent at No 42A Lorong Cheah Cheng Lim, 30350, Ipoh Perak ("premise 2"). Premise 1 is adjacent to premise 2 (collectively referred to as "the premises").

[5] During an inspection on 11 August 2016, the appellant's employees discovered the tampering of meters at the premises. The appellant then issued a notice of disconnection of electricity supply ("NDES") on 11 August 2016 (on the same day of the inspection), notifying the respondents that the electricity supply to the premises would be disconnected under s. 38(1) of the Act (both NDES to the premises are collectively referred to as "NDES 1").

[6] In NDES 1, the respondents were duly informed of the intended disconnection of electricity to the premises on 8 September 2016.

[7] It was not a matter of dispute that the meters had been rectified with no outstanding electricity bills for the premises since that inspection on 11 August 2016.

[8] On 5 September 2016, the respondents filed a writ against the appellant for the following reliefs, among others:

(i) for a declaration that the respondents did not tamper with the meters;

(ii) the respondents do not owe any monies to the appellant resulting from 11 August 2016 inspection; and

(iii) that the NDES 1 dated 11 August 2016 to be declared null and void.

[9] On 6 September 2016, the respondents filed an *ex parte* application for an interim injunction against the appellant from carrying out the disconnection as stipulated in NDES 1 until the final disposal of the action. The High Court granted the *ex parte* interim injunction on 7 September 2016. The appellant's applications to set aside the *ex parte* interim injunction and *inter partes* application to set aside the said injunction were dismissed by the High Court.

[10] Aggrieved, the appellant filed an appeal to this court against the decision. On 31 October 2017, this court allowed the appellant's appeal against the said High Court's decision.

[11] Following the decision of this court, on 3 August 2018, the appellant issued the second NDES ("NDES 2" RR Vol. 2B (part C) encl. 4 pdf pp. 18-19/hardcopy at pp. 215-222).

[12] The respondents subsequently filed another application in encl. 69 for an interim injunction to restrain the appellant from carrying out the intent of NDES 2. The High Court again allowed the injunction, hence this appeal before us.

Appeal 521

[13] The second respondent is a company carrying out the business of processing, freezing and cold storage of seafood at No. 1541, Lorong Kerapu, Taman Sejahtera, 35400 Hutan Melintang, Perak ("the premise").

[14] The appellant inspected the premise on 7 June 2018, where the appellant's employees also discovered tampering of the electricity meter.

[15] The premise had originally belonged to the first respondent, but it was subsequently acquired by the second respondent by way of a sale and purchase agreement dated 31 March 2009. That said, at the inspection date, the first respondent remained as the registered user of the appellant.

[16] As a consequence of the tampering of the electricity meter, the appellant issued the notice of disconnection of electricity supply (NDES) for execution on 3 July 2018.

[17] On 27 June 2018, the respondents filed a writ against the appellant for:

(i) a declaration that the respondents did not tamper with the meter;

(ii) an injunction to prohibit the appellant from disconnecting the electricity supply to the premise; and

(iii) a declaration that the NDES dated 7 June 2018 is null and void.

[18] On 28 June 2018 (before the disconnection date), the respondents applied for an interim injunction in encl. 4, premised on the following grounds:

(i) the second respondent has the *locus standi* in applying for an injunction, being the actual user, though not being the registered user of electricity supplied to the premise;

(ii) corrective measures had been taken on the alleged tampered meter; therefore, the appellant cannot continue with its action to disconnect the supply of power to the premise;

(iii) any disconnection to be carried out at this juncture would cause irreparable damage to the second respondent's business; and

(iv) the appellant will not suffer any loss if the disconnection is not carried out at this juncture, pending the final disposal of the respondent's suit.

[19] For the avoidance of doubt, NDES 2 in Appeal 488 and NDES in appeal 521 hereinafter will be referred to as "NDES" unless expressly stated. The premises in Appeal 488 and the premise in Appeal 521 will be collectively referred to as "the premises".

A **Findings Of The High Court**

[20] In both cases, after considering various arguments advanced by the respondents and the appellant, His Lordship allowed both applications for an interim injunction pending the disposal of the suits.

B **[21]** On the preliminary issue of *locus standi* in Appeal 521, His Lordship was satisfied that the second respondent had sufficiently established that it has a legitimate interest and business at the premise to apply for an injunction. His Lordship had also rejected the preliminary issue on *res judicata* and estoppel raised in Appeal 488, with a view that the application under encl. 69 is premised differently from the earlier application where the C interim injunction granted had been set aside by the Court of Appeal.

[22] On the application for an injunction pending the disposal of the suit, His Lordship applied the principles in *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 and concluded that D the respondents would suffer greater injustice by not granting the injunction to maintain the *status quo* pending the trial proper of the suit. His Lordship opined that on a balance of convenience and justice of the case, the scale tilted for the respondents in the granting of an injunction.

[23] On the appellant's statutory powers to disconnect the electricity E supply, His Lordship had considered the legal issue raised by both parties on s. 38(4) the Act. His Lordship referred to and followed the Court of Appeal's decision in *Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd* [2015] 6 CLJ 788. That being the case, the legality of the NDES by the appellant remains an issue to be determined at the trial.

F **Issues In These Appeals**

[24] There are some common issues in both appeals, namely:

(i) whether the respondents have satisfied the requirement to obtain an interim injunction pending the disposal of the suits; and

G (ii) whether there has been a correct application of s. 38 of the Act in relying on *Mayaria*.

Separately, the preliminary issues were:

(i) for Appeal 488 on *res judicata* and estoppel due to the setting aside by H the Court of Appeal, of the injunction issued on NDES 1;

(ii) for Appeal 521 on *locus standi* of the second respondent since it is not the registered user with the appellant for the electricity supply; and

(iii) the required undertaking as to damages was not given at the High Court I proceedings and it was not at all averred in the affidavit in support of the application.

Decision

[25] On the issues impacting the second respondent in Appeal 521 (legal standing, being the premise owner is the actual user of the power supply though not being the registered user), the second respondent was given a concession by the appellant to take legal action against them. In the circumstances, we believe that we do not need to deal with this issue at this stage. We would, however, like to stress that this concession is only limited to the case in this appeal and does not apply elsewhere. The appellant argued that the respondents are not entitled to an injunction as they failed to provide the required undertaking as to damages. However, through their counsel in open court, the respondents gave the said undertaking as to damages. Therefore, this is no longer an issue.

[26] The appellant further argued that the respondents are not entitled to the injunction since the appellant has the statutory right to disconnect under s. 38 of the Act. It was wrong on the respondents to rely on *Mayaria* as the case was decided before the amendment to s. 38. The proper authority is *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* [2018] 9 CLJ 184, which was decided after the said amendment. With the amendment of sub-s. (4) of s. 38, the appellant must disconnect the supply after the discovery of tampering where the appellant can issue a written statement, and this statement shall be *prima facie* evidence of the amount due from the registered customer or user.

[27] It was submitted before us by the respondents' learned counsel that it is in the public domain that the Federal Court affirmed the decision in *Mayaria* (*supra*) by a corum of five on 4 September 2019. However, unfortunately, we were informed that no written judgment is available. The Federal Court decision was supposedly pronounced after the decision of this case at the High Court.

[28] We are of the considered view that considering the Federal Court's said decision in *Mayaria*, suffice to say that His Lordship was correct in exercising his discretion in granting the injunction against the appellant from disconnecting the electricity supply pending the hearing of the main suits. We agree with His Lordship's conclusion that *Mayaria* is the case on point as the facts are similar.

[29] However, learned counsel for the appellant submitted that the amendment by Act A1501 to s. 38, particularly sub-s. (4) of the Act that came into force on 1 January 2016 by [PU(B) 501/2015] was after this court's decision in *Mayaria* and, therefore, altered the position in *Mayaria*.

[30] We have perused the amendment. We find that with the amendment, sub-ss. (1) and (3) were substituted with the new provisions, new sub-s. 1B was inserted, and consequential amendment to the other subsections. For convenience, we reproduced s. 30 of the amending Act A1501 to appreciate the provisions that have been amended as follows:

(30) Section 38 of the principal Act is amended:

(a) by substituting for subsection (1) the following subsection:

(1) Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorised by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty-eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(b) by inserting after subsection (1A) the following subsection:

(1B) Upon receiving such information under subsection (1), the Commission may verify the matter, and in cases where it finds that no offence has been committed, the supply of electricity shall be reconnected immediately.

(c) by substituting for subsection (3) the following subsection:

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsection 37(1), (3) and (14) and any reasonable expenses directly incurred by the licensee under this section including expenses incurred in respect of reconnection of electricity in the manner as have been directed by the Commission: Provided that and subject to sub-s. (4), if the licensee does not proceed with a claim for such loss of revenue and expenses in court, the licensee may only claim against the consumer for the said loss of revenue and expenses for a period not exceeding six months retrospectively from the date the offence was discovered under subsection (1).

(d) in subsection (4):

(i) by inserting after the words "sub-s. (3)" the words "and such written statement shall be notified to the consumer within fourteen working days or any period as extended with the written approval of the Commission after the disconnection"; and

(ii) in paragraph (a):

(A) by inserting before the word "expenses" the word "reasonable";

(B) by deleting the word "and" at the end of the paragraph; and

(C) by inserting after paragraph (a), the following paragraph:

(aa) the manner of calculation of the loss of revenue and items of expenses; and"; and

(e) in sub-s. (5), by inserting after the words "written statement" the words "under subsection (4)".

[31] In the new provisions as of 1 January 2016, s. 38 will be read as follows:

(1) Where any person employed by **a licensee finds** upon any premises evidence which gives reasonable grounds for him to believe **that an offence has been committed under subsection 37(1), (3) or (14)**, the licensee or any person duly authorised by the licensee **shall within three working days** from the date of such finding inform the Commission in writing, and the licensee may, upon **giving not less than forty-eight hours' notice** from the same date in such form as may be prescribed, **cause the supply of electricity to be disconnected from the said premises**.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under s. 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.

(1B) Upon receiving such information under subsection (1), the Commission may verify the matter, and in cases where it finds that no offence has been committed, the supply of electricity shall be reconnected immediately.

(2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection.

Provided that the period of disconnection shall not exceed three months.

(2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer, not below the rank of Assistant Superintendent.

(3) The licensee **may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3), and (14)** and any reasonable expenses directly incurred by the licensee under this section, including expenses incurred in respect of reconnection of electricity in the manner as have been directed by the Commission:

Provided that and subject to subsection (4), if the licensee does not proceed with a claim for such loss of revenue and expenses in court, the licensee may only claim against the consumer for the said loss of revenue and expenses for a period not exceeding six months retrospectively from the date the offence was discovered under sub-s. (1).

(4) **A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying**:

A **(a) the amount of loss of revenue or the reasonable expenses incurred by the licensee;**

(aa) the manner of calculation of the loss of revenue and items of expenses; and

(b) the person liable for the payment thereof,

B *shall be **prima facie** evidence of the payment that has to be made by the consumer under sub-s. (3), and such written statement shall be notified to the consumer within fourteen working days or any period as extended with the written approval of the Commission after the disconnection.*

C (5) The amount stated in the written statement under sub-s. (4) shall, within the period specified in the statement, be due and payable to the licensee, and in default of payment, such amount shall be recoverable by civil action in a court.

(emphasis added)

D **[32]** We also reproduced the pre-amendment provisions of s. 38 as follows:

38. Disconnection of supply of energy

(1) Where any person employed by a licensee **finds upon any premises evidence which in his opinion proves that an offence has been committed under s. 37(1), 37(3), or 37(14)**, the licensee or any person duly
E authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply
F authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under s. 21A of the Common Gaming Houses Act 1953, the supply authority or the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises; and

G (2) **If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee, at his discretion, gives permission for reconnection:**

Provided that the period of disconnection shall not exceed three months.

H (2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer, not below the rank of Assistant Superintendent.

I (3) **The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under s. 37(1), 37 (3), and 37(14)** and any expenses incurred by the licensee under this section, including expenses incurred in respect of the reconnection of electricity supply.

(4) A written **statement by an employee of** the licensee duly certified by the licensee or any person authorised by the licensee specifying:

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof shall be *prima facie* evidence of the payment that has to be made by the consumer under sub-s. (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee, and in default of payment, such amount shall be recoverable by civil action in a court.

(emphasis added)

[33] We remind ourselves not to venture into the merit of the substantive case as the issue before us is whether there are serious issues to be tried for His Lordship at the High Court to exercise his discretion in granting an interim injunction pending the hearing of the suits. However, upon perusal of the amended s. 38 of the Act, particularly sub-s. (4), we are unable to find the provision that enable the appellant as a provider of the electricity supply to disconnect the supply after the offending meter has been rectified or remedied and further loss of revenue has ceased. Therefore, in our view, the amendment has not altered the position as determined by the Federal Court in affirming this court's decision in *Mayaria*. The appellant's statutory right to disconnect is still relevant and constitutes a serious question that must be addressed substantively and fully determined at the trial.

[34] Our view is further fortified by the rationale or the reasons of the amendment as explained in para. 31 of the explanatory statement of the amendment Bill as follows:

31. Clause 30 seeks to amend s. 38 of Act 447 **to ensure that only in clear and proven cases of electricity theft** under the Act **can a licensee disconnect supply to a consumer**. The Commission may also verify whether such offences had been committed and if it has not been committed, the Commission may direct the reconnection of supply of electricity by the licensee. The licensee shall also **have to prove that it had suffered losses** and reasonable expenses **before it can claim against the consumer** concerned, and the licensee **can only recover such losses** or expenses **through a court action and not by disconnection of supply of electricity** and the licensee may only claim for the loss of revenue and expenses for a period of six months only unless it is a claim in court.

(emphasis added)

[35] The arguments by the appellant's learned counsel are evidently contradictory to the legislative intent. We can only interpret the law as the Legislature passes it. It is trite that we cannot improve on it or read deeming provisions into it. An examination of the structural amendment of sub-s. (4)

A of s. 38 invites a judicial determination whether the appellant has a right to disconnect the supply of electricity after the meter had been rectified and is in good working order with no further loss of revenue occasioned to the appellant.

B **[36]** Based on the foregoing reasons, we do not find any merit in both appeals, and we unanimously dismissed the appeals with costs in the cause.

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